A

BON CHONG HING & ANOR

v.

GAMA TRADING COMPANY (HONG KONG) LTD

B

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
SULONG MATJERAIE JCA
KANG HWEE GEE JCA
[CIVIL APPEAL NO: J-02(IM)-3119-2009]

C

17 MAY 2010

CIVIL PROCEDURE: *Summary judgment - Triable issues - Questions of law - Whether court may determine questions of law in a summary judgment application - Whether questions of law raised were misconceived and plainly unsustainable - Whether a proper case for summary judgment*

D

COMPANY LAW: *Members' rights - Shareholders - Right to sue for breach of Shareholders Agreement - Profit guarantee clause in shareholders' agreement - Appellants guaranteeing to pay new investor any shortfall between actual profit achieved and guaranteed profit - Whether profit guarantee clause survives insolvent liquidation of company - Whether appellants released from guarantee due to creditors' liquidation - Whether insolvency of company triggered profit guarantee*

E

F

CONTRACT: *Construction - Interpretation of agreement - Objective approach - Aim or purpose of transaction - Factual matrix forming background to contract - Words used in contract - Contract to be construed to conform with business logic*

G

CONTRACT: *Terms - Profit guarantee clause - Shareholders' agreement - Appellants guaranteeing to pay new investor any shortfall between actual profit achieved and guaranteed profit - Whether profit guarantee clause survives insolvent liquidation of company - Whether appellants released from guarantee due to creditors' liquidation - Whether insolvency of company triggered profit guarantee*

H

Upon the appellants' request, the respondent had invested in a company known as Top Alloy Manufacturing Sdn Bhd ('Top Alloy'). The appellants, prior to the respondent's admission as a shareholder of Top Alloy, were the sole shareholders in Top Alloy. The respondent agreed to invest and subscribe for shares in Top Alloy based on the terms and conditions contained in the shareholders' agreement ('the agreement'). This agreement was a

I

contract of guarantee by the appellants wherein they guaranteed to the respondent that Top Alloy would achieve a minimum profit ('the profit guarantee'). The agreement also set out the terms and conditions governing the relationship of the parties. The profit guarantee in cl. 4 of the agreement provided that Top Alloy would achieve a profit after tax of RM9.9 million being the cumulative profit for four years from 1 January 2007 until 31 December 2010. The appellants agreed that in the event this profit was not achieved, the appellants would pay the respondent the shortfall between the actual after tax profit achieved and the guaranteed sum of RM9.9 million. The appellants' liability for the shortfall was capped at a maximum sum of RM2.69 million. Subsequently Top Alloy became hopelessly insolvent and ceased operations with a provisional liquidator being appointed. The respondent therefore claimed against the appellants under the profit guarantee. The learned High Court judge allowed the respondent's application for summary judgment. Hence, this appeal. The appellants contended, *inter alia*, that: (i) the agreement stated that the appellants were to provide the profit guarantee in the form and substance of the Seventh Schedule to the agreement. Since, the Seventh Schedule was never executed, the profit guarantee was never intended by the parties to take effect; (ii) the agreement automatically terminated pursuant to cl. 21 when Top Alloy entered into a creditors' voluntary liquidation; (iii) the first appellant was released from the guarantee because of the termination of the agreement and due to the creditors' liquidation; and (iv) the respondent failed to ascertain the actual amount of the shortfall between the actual after tax profit achieved and the guaranteed profit of RM9.9 million.

Held (dismissing the appeal with costs)
Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) The appellants' defence merely raised questions of law which were entirely misconceived and plainly unsustainable and the respondent was entitled to summary judgment. In an appropriate case, the court must not hesitate to decide questions of law in an O. 14 application notwithstanding the fact that the question of law may at first blush be of some complexity and may take a little longer to understand. Where a point of law is raised in regard to the construction of an

A agreement and its determination will determine all the issues between the parties, then it is a proper case for summary judgment. (paras 18-20)

(2) That the task of interpreting a contract requires an objective approach. The court must determine the objective aim or purpose of the transaction and this is usually done by taking into account the factual matrix that forms the background to the contract. Emphasis is always placed on the words used in the contract but where the words used lead to a conclusion that defies business logic, then the contract must be construed in such a way as to make it conform to business logic. (paras 35 & 36)

(3) Clause 4 of the agreement provided clear and precise details of the profit guarantee. Applying the objective approach, cl. 4 of the agreement was by itself a profit guarantee. Reference to the Seventh Schedule was merely superfluous and not needed. Clause 4 of the agreement was an operative profit guarantee capable of enforcement. (paras 41-43)

(4) Clause 21 of the agreement showed that the rights and obligations contained in cls. 6 to 20 would terminate upon the liquidation of Top Alloy. But cl. 21 did not refer to the termination of the profit guarantee in cl. 4 upon the liquidation of Top Alloy. Further, the appellants contentions would defeat the purpose of the profit guarantee which was essentially to compensate the respondent in the event Top Alloy did not achieve a certain amount of profit. It was a contradiction in terms to suggest that the profit guarantee terminated and was rendered ineffective upon the insolvent liquidation of Top Alloy. The profit guarantee was obviously meant to deal with the eventuality of Top Alloy becoming insolvent. (para 53)

(5) The decision to place Top Alloy under creditors' liquidation could not by any stretch of the imagination to be equated as a mutual termination of the profit guarantee. Whether Top Alloy was wound up by way of compulsory liquidation by the court or by a creditors' voluntary liquidation it could not change the fact that Top Alloy was hopelessly insolvent and its insolvency triggered the profit guarantee. (para 63)

(6) The appellants' liability increased as the profit achieved diminished but subject to a maximum exposure of RM2.69 million. Since Top Alloy became insolvent and did not reap any profit, the appellants were liable to the full extent of the guarantee of RM2.69 million. (para 68)

Bahasa Malaysia *Translation Of Headnotes*

Ekoran dari permintaan perayu-perayu, responden telah melabur dalam sebuah syarikat yang dipanggil Top Alloy Manufacturing Sdn Bhd ('Top Alloy'). Sebelum dari kemasukan responden sebagai pemegang saham Top Alloy, pemegang-pemegang saham Top Alloy hanyalah terdiri dari perayu-perayu. Responden bersetuju untuk melabur dan memiliki saham Top Alloy berdasarkan kepada syarat dan terma yang terkandung di dalam perjanjian pemegang saham yang dimeterai pihak-pihak ('Perjanjian'). Perjanjian adalah satu kontrak gerenti yang dibuat oleh perayu-perayu di mana mereka menggerenti kepada responden bahawa Top Alloy akan menerima satu keuntungan yang minima ('gerenti keuntungan'). Perjanjian juga membentangkan syarat dan terma yang mengawalselia perhubungan di antara pihak-pihak. Gerenti keuntungan di dalam fasal 4 Perjanjian memperuntukkan bahawa Top Alloy akan menerima keuntungan selepas cukai sebanyak RM9.9 juta, iaitu keuntungan kumulatif selama empat tahun bermula dari 1 Januari 2007 hingga 31 Disember 2010. Perayu-perayu bersetuju bahawa sekiranya keuntungan ini tidak dapat dicapai, mereka akan membayar kepada responden perbezaan jumlah di antara keuntungan selepas cukai sebenar yang diperolehi dan jumlah yang digerentikan sebanyak RM9.9 juta. Apapun, liabiliti perayu-perayu atas kekurangan tersebut dihadkan kepada maksima RM2.69 juta. Berikutnya, Top Alloy menjadi insolven dengan teruknya dan telah memberhentikan operasinya di mana seorang pelikuidasi sementara telah dilantik. Responden dengan itu menuntut terhadap perayu-perayu di bawah gerenti keuntungan. Yang arif hakim Mahkamah Tinggi membenarkan permohonan responden untuk penghakiman terus, dan perayu-perayu merayu. Antara lain, perayu-perayu berhujah bahawa: (i) perjanjian menyebut bahawa perayu-perayu akan memberikan gerenti keuntungan dalam bentuk dan berasaskan Jadual Ketujuh Perjanjian. Walaupun begitu, oleh kerana Jadual Ketujuh tidak pernah dimeterai, maka gerenti keuntungan tidak diniatkan untuk dikuatkuasakan oleh pihak-pihak; (ii) perjanjian dengan sendirinya ditamatkan berdasarkan fasal 21 apabila Top Alloy memasuki likuidasi sukarela pemiutang; (iii) perayu pertama

dilepas dari gerenti disebabkan oleh penamatan Perjanjian ekoran dari likuidasi pemiutang; dan (iv) responden gagal menentukan jumlah sebenar kekurangan di antara keuntungan selepas cukai sebenar yang dicapai dan keuntungan yang digerenti sebanyak RM9.9 juta.

Diputuskan (menolak rayuan dengan kos)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Pembelaan perayu-perayu hanya membangkitkan persoalan undang-undang yang semuanya tersasar dan jelas tidak boleh dipertahankan dan responden sememangnya berhak kepada penghakiman terus. Dalam suatu kes yang sesuai, mahkamah tidak harus teragak-agak untuk menjawab persoalan undang-undang dalam satu permohonan A. 14, walaupun persoalan undang-undang tersebut sekali imbas nampak agak kompleks dan mengambil sedikit masa untuk difahami. Di mana persoalan undang-undang dibangkitkan mengenai pentafsiran suatu perjanjian dan pemutusannya akan menyelesaikan kesemua isu di antara pihak-pihak, maka ia adalah sesuai untuk penghakiman terus.

(2) Tugas mentafsirkan kontrak memerlukan kepada pendekatan yang objektif. Mahkamah harus menentukan tujuan atau maksud objektif transaksi dan ini biasanya dilakukan dengan mengambilkira gagasan fakta yang menjadi latar belakang kontrak. Penekanan hendaklah sentiasa diberikan kepada perkataan-perkataan yang digunakan di dalam kontrak tetapi di mana perkataan-perkataan yang digunakan membawa kepada konklusi yang bertentangan dengan logika perniagaan, maka kontrak hendaklah ditafsirkan dengan sebegitu cara bagi menepati logika perniagaan.

(3) Fasal 4 Perjanjian membentangkan butir-butir gerenti keuntungan dengan jelas dan tepat. Menggunapakai pendekatan objektif, fasal 4 Perjanjian secara bersendiri merupakan suatu gerenti keuntungan. Rujukan kepada Jadual Ketujuh adalah terlebih perlu dan tidak diperlukan. Fasal 4 Perjanjian adalah gerenti keuntungan yang beroperatif dan boleh dikuatkuasakan.

(4) Fasal 21 Perjanjian menunjukkan bahawa hak-hak dan obligasi yang terkandung di dalam fasal-fasal 6 hingga 20 akan tamat apabila Top Alloy dilikuidasikan. Fasal 21 bagaimanapun tidak merujuk kepada penamatan gerenti keuntungan dalam fasal 4 dengan terlikuidasinya Top Alloy. Selain itu, hujah perayu-perayu akan mengalahkan tujuan gerenti keuntungan yang mana secara intinya adalah untuk mempampasi responden jika Top Alloy tidak mencapai suatu tahap keuntungan. Adalah suatu percanggahan terma untuk berkata bahawa gerenti keuntungan menjadi tamat dan menjadi tidak berkesan sebaik Top Alloy dilikuidasi kerana sudah insolven. Gerenti keuntungan jelas dimaksudkan untuk menangani kemungkinan Top Alloy menjadi insolven.

(5) Keputusan untuk meletakkan Top Alloy di bawah likuidasi pemiutang tidak boleh walau dengan apa cara sekalipun disamakan dengan penamatan mutual gerenti keuntungan. Sama ada Top Alloy digulung melalui likuidasi wajib oleh mahkamah atau melalui likuidasi sukarela pemiutang ianya tidak boleh menukar fakta bahawa Top Alloy telah insolven dengan tenatnya dan keinsolvenannya itu telah mencetuskan gerenti keuntungan.

(6) Liabiliti perayu-perayu bertambah dengan berkurangnya keuntungan yang dicapai tetapi tertakluk kepada tanggungan maksima RM2.69 juta. Oleh kerana Top Alloy menjadi insolven dan tidak mendapat sebarang keuntungan, maka perayu-perayu perlu menanggung keseluruhan gerenti RM2.69 juta tersebut.

Case(s) referred to:

Antaios Compania Naviera SA v. Salen Rederierna AB [1985] 1 AC 191 ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Browning, Assignees of Morgan, a Bankrupt v. Stallard [1814] 5 Taunt 450 ***(refd)***

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***

Commercial Banking Co of Sydney Ltd v. Patrick Intermarine Acceptances Ltd [1978] 52 ALJR 404 ***(refd)***

Direct Acceptance Finance Ltd v. Cumberland Furnishing Pty Ltd [1965] NSWR 1504 ***(refd)***

European Asian Bank AG v. Punjab & Sind Bank [1983] 2 All ER 508 ***(refd)***

General Surety & Guarantee Co Ltd v. Francis Parker Ltd [1980] 6 BLR 16 ***(refd)***

Harburg India Rubber Comb Company v. Martin [1902] 1 KB 778 ***(refd)***
Home and Overseas Insurance Co Ltd v. Mentor Insurance Co (UK) Ltd (In Liquidation) [1990] 1 WLR 153 ***(refd)***
Kwan Chew Holdings Sdn Bhd v. Kwong Yik Bank Bhd [2007] 2 CLJ 127 CA ***(refd)***
Law Land Co Ltd v. Consumers Association [1980] 2 EGLR 109 ***(refd)***
Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC ***(refd)***
Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd [1997] AC 749 ***(refd)***
Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 CA ***(refd)***
Prenn v. Simmonds [1971] 3 All ER 237 ***(refd)***
Renofac Builder (M) Sdn Bhd v. Chase Perdana Bhd [1999] 3 CLJ 181 HC ***(refd)***
Richards, Re; Lloyd (Official Receiver), Ex p; WC Angliss Co (Aust) Pty Ltd [1935] 8 ABC 37 ***(refd)***
Rock Records (M) Sdn Bhd v. Audio One Entertainment Sdn Bhd [2005] 1 CLJ 200 HC ***(refd)***
Sunbird Plaza Proprietary Limited v. Maloney And Another [1988] 166 CLR 245 ***(refd)***
Total Oil Products (Aust) Pty Ltd v. Robinson [1970] 1 NSWR 701 ***(refd)***
Weardale Coal And Iron Co, Limited v. C W Hodson, A E Hodson [1894] 1 QB 598 ***(refd)***
Western Dominion Investment Company, Limited v. MacMillan [1925] 2 DLR 442 ***(refd)***
Yeoman Credit Ltd v. Latter [1961] 1 WLR 828 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 219(1), 254, 303(3), 304(1), (5)
Rules of the High Court 1980, O. 14

Other source(s) referred to:
De Colyar, *Treatise on the Law of Guaranties and of Principal and Surety,* 3rd edn, p 1
Fell's Treatise, *The Law of Mercantile Guaranties and of Principal and Surety in General,* 2nd edn, 1820, p 1
Halsbury's Laws of England, 4th edn, vol 20, p 56
Smith, John William, *A Compendium of Mercantile Law,* 13th edn, 1931, p 546

For the appellants/defendants - Tee Yee Koon; M/s SK Song
For the respondent/plaintiff - Dr Clarence Edwin (R Paramanandan with him); M/s Clarence Edwin Law Offices

Reported by Amutha Suppayah

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

[1] This was an appeal filed by both the appellants defendants from the decision of the learned Judicial Commissioner ("JC") of the Johor Bahru High Court who allowed the respondent plaintiff's application for summary judgment under O. 14 of the Rules of the High Court 1980 ("RHC"). On 21 April 2010, this court granted a stay of the learned JC's order pending the disposal of this appeal.

[2] An O. 14 application is the best procedure in the RHC that allows the respondent plaintiff to dispose of an action where the appellants defendants' defence is clearly unsustainable in law or on the facts. In this way, the need for a full trial will be obviated and a lot of time and costs will be saved.

[3] While sitting on the High Court bench, Abdul Malik bin Ishak J (now JCA) had occasion to say in *Rock Records (M) Sdn Bhd v. Audio One Entertainment Sdn Bhd* [2005] 1 CLJ 200, at pp. 204 to 205 about the efficacy of the O. 14 application:

> (3) The plaintiff is confident that it will succeed in its cause of action and so the plaintiff files the Order 14 application. It is now trite law that a plaintiff may obtain a judgment against the defendant on the ground that the defendant has no cause of action.
>
> (4) The plaintiff must establish its cause of action, that is, copyright infringement and that the defendant has not raised any defence to the plaintiff's claim of copyright infringement or any triable issue for that matter. Once the plaintiff succeeds in making out a *prima facie* case, the onus then shifts to the defendant to show to this court as to why judgment should not be entered against it.

[4] What this amounts to is this. That the court must embark on a critical evaluation of the facts presented by the parties through their pleadings and affidavits bearing in mind that mere bare assertions or denials must be rejected. Indeed this was the approach adopted by the Supreme Court in *Bank Negara Malaysia v. Mohd. Ismail Ali Johor & Ors.* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14, where Mohd Azmi SCJ speaking for the majority remarked at p. 19 that:

A Under an Order 14 application, the duty of a Judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the Judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable. In our opinion, unless this principle is adhered to, a Judge is in no position to exercise his discretion judicially under an Order 14 application. Thus, apart from identifying the issues of fact or law, the Court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

[5] In the present appeal, only three affidavits were filed in support of the summary judgment application, namely:

(a) the respondent plaintiff's affidavit in support;

(b) the appellants defendants' affidavit in reply; and

(c) respondent plaintiff's affidavit in reply.

[6] We have scrutinised the three affidavits with a fine toothcomb and we found that there were no facts in dispute. In our judgment, the whole case revolves solely on questions arising from the interpretation of the contract between the parties.

The Facts

[7] The undisputed facts gleaned from the affidavits may be stated in this way.

[8] The respondent plaintiff is a company based in Hong Kong. While the appellants defendants are Malaysian individuals and they requested the respondent plaintiff to invest in a company known as Top Alloy Manufacturing Sdn Bhd ("Top Alloy"). The respondent plaintiff agreed to the request of the appellants defendants. It must be borne in mind that the appellants defendants, prior to the respondent plaintiff's admission as a shareholder of Top Alloy, were the sole shareholders in Top Alloy.

[9] Now, the respondent plaintiff agreed to invest and subscribe for shares in Top Alloy based on the terms and conditions contained in the shareholders' agreement dated 5 May 2006. This very agreement has two distinct features. Firstly, it is a contract

of guarantee by the appellants defendants wherein they guaranteed to the respondent plaintiff that Top Alloy would achieve a minimum profit ("the profit guarantee"). Secondly, the agreement sets out the terms and conditions governing the relationship of the parties as shareholders of Top Alloy which may conveniently be termed as a shareholders' agreement.

[10] The profit guarantee is set out in cl. 4 of the shareholders' agreement. That cl. 4 states that the appellants defendants guarantee that Top Alloy would achieve a profit after tax of RM9.9 million being the cumulative profit for four years from 1 January 2007 until 31 December 2010. The appellants defendants agreed that in the event this profit is not achieved, the appellants defendants would pay the respondent plaintiff the shortfall between the actual after tax profit achieved and the guaranteed sum of RM9.9 million. But the appellants defendants' liability for the shortfall was capped at a maximum sum of RM2.69 million.

[11] Top Alloy did not prosper and it became hopelessly insolvent and ceased operations sometime in February 2008. Top Alloy's directors lodged, on 22 September 2008, a statutory declaration with the Registrar of Companies and the Official Receiver that the company was unable to continue business and the directors thereafter appointed a provisional liquidator.

[12] Since Top Alloy had become insolvent during the profit guarantee period of 1 January 2007 to 31 December 2010 and was placed under creditors' liquidation, it was apparent that Top Alloy would not be achieving the cumulative after tax profit of RM9.9 million which the appellants defendants had guaranteed to the respondent plaintiff. And due to the fact that Top Alloy was insolvent, it is beyond dispute that it did not achieve any cumulative after tax profit whatsoever. Top Alloy was a total loss. This fact cannot be disputed at all.

[13] It is against this background scenario that the respondent plaintiff held the view that the appellants defendants' liability under the profit guarantee accrued and that the appellants defendants are liable to pay to the respondent plaintiff the sum of RM2.69 million. With this in mind, the respondent plaintiff sent a letter of demand dated 9 December 2008 to the appellants defendants for the sum of RM2.69 million. But the appellants defendants by letter dated 23 January 2009 denied liability.

[14] The respondent plaintiff then filed this action in the High Court of Johor Bahru. Immediately after the appellants defendants entered an appearance, the respondent plaintiff filed its application for summary judgment (*Renofac Builder (M) Sdn Bhd v. Chase Perdana Bhd* [1999] 3 CLJ 181). On 10 December 2009, the learned JC entered summary judgment against the appellants defendants for the benefit of the respondent plaintiff. The appellants defendants now appeal to this court.

The Defences Raised By The Appellants Defendants

[15] The following defences were raised by the appellants defendants:

(a) That the shareholders' agreement states that the appellants defendants are to provide the respondent plaintiff with a profit guarantee in the form and substance of the Seventh Schedule to the shareholders' agreement. But the appellants defendants contended that since the Seventh Schedule to the shareholders' agreement was never executed, the profit guarantee was never intended by the parties to take effect.

(b) That the shareholders' agreement between the parties automatically terminated pursuant to cl. 21 when Top Alloy entered into a creditors' voluntary liquidation.

(c) That the first appellant defendant by the name of Bon Chong Hing @ Chong Hing was released from the guarantee because of the alleged termination of the shareholders' agreement and also because of the creditors' liquidation on 15 October 2008.

(d) That the respondent plaintiff failed to ascertain the actual amount of the shortfall between the actual after tax profit achieved and the guaranteed profit of RM9.9 million.

Analysis

[16] We have anxiously read the affidavits and it is patently clear that the facts are not in dispute. We observe that the facts are clearly established by documentary evidence which neither party has challenged. We also observe that the issues raised by the appellants defendants to the application for summary judgment are purely centred on issues of interpretation of the contract and this in turn raised questions of law. We see no reason at all as to why this case cannot be disposed of by way of a summary procedure under O. 14 of the RHC.

[17] We, once again, make reference to the case of *Bank Negara Malaysia v. Mohd. Ismail Ali Johor & Ors (supra)*, at p. 20 where Mohd Azmi SCJ aptly said:

> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the Court should exercise its duty under Order 14. If the legal point is understood and the Court is satisfied that it is unarguable, the Court is not prevented from granting a summary judgment, merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'.

[18] We categorically say that the salient observations of Mohd Azmi SCJ in *Bank Negara Malaysia v. Mohd. Ismail Ali Johor & Ors (supra)* should be vigorously applied to the factual matrix of the present appeal. We note that the defence filed by the appellants defendants merely raised questions of law which are entirely misconceived and plainly unsustainable and the respondent plaintiff is certainly entitled to summary judgment (*Home and Overseas Insurance Co Ltd v. Mentor Insurance Co (UK) Ltd (In Liquidation)* [1990] 1 WLR 153, at 158 to 159).

[19] In an appropriate case, the court must not hesitate to decide questions of law in an O. 14 application notwithstanding the fact that the question of law may at first blush be of some complexity and may take a little longer to understand (*European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508, at 515, CA).

[20] According to Hashim Yeop A Sani SCJ in *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182; [1987] 2 MLJ 183, at 184, that where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should act and exercise its duty under O. 14 and decide on the question of law; and after having considered the argument the court is fully satisfied that it is unarguable then the court should grant summary judgment.

[21] Where a point of law is raised in regard to the construction of an agreement and its determination will determine all the issues between the parties, then it is a proper case for summary judgment.

[22] Now, the shareholders' agreement before us concerns a contract of guarantee. It was the appellants defendants who guaranteed to the respondent plaintiff that Top Alloy would be profitable. The question to pose is this. What is a guarantee? A guarantee is said to be a binding promise of one person to be answerable for a present or future debt or obligation of another if that other defaults (*Yeoman Credit Ltd v. Latter* [1961] 1 WLR 828, CA; *Sunbird Plaza Proprietary Limited v. Maloney And Another* [1988] 166 CLR 245; *Direct Acceptance Finance Ltd v Cumberland Furnishing Pty Ltd* [1965] NSWR 1504 (NSWSC 1965); *Total Oil Products (Aust) Pty Ltd v. Robinson* [1970] 1 NSWR 701; *General Surety & Guarantee Co Ltd v. Francis Parker Ltd* [1980] 6 BLR 16; *Richards, Re; Lloyd (Official Receiver), Ex p; WC Angliss Co (Aust) Pty Ltd* [1935] 8 ABC 37; *Browning, Assignees of Morgan, a Bankrupt v. Stallard* [1814] 5 Taunt 450; *Commercial Banking Co of Sydney Ltd v. Patrick Intermarine Acceptances Ltd* [1978] 52 ALJR 404 at 406; and *Western Dominion Investment Company, Limited v. MacMillan* [1925] 2 DLR 442, affirmed by the Court of Appeal in [1925] 4 DLR 562, CA).

[23] In *Fell's Treatise on The Law of Mercantile Guaranties and of Principal and Surety in General*, 2nd edn, published in 1820, at p. 1 thereto, a guarantee is defined as follows:

> A guarantee is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is, in the first instance, liable to such payment or performance.

[24] In *Halsbury's Laws of England*, 4th edn, vol. 20, at p. 56, a guarantee is defined as:

> ... an accessory contract by which the promisor undertakes to be answerable to the promisee for the debt, default, or miscarriage of another person, whose primary liability to the promisee must exist or be contemplated.

[25] In Smith, John William on *A compendium of Mercantile Law*, 13th edn, 1931 at p. 546, a guarantee is defined as:

> ... a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is himself, in the first instance, liable to such payment or performance.

[26] A guarantee, in De Colyar on *Treatise on the Law of Guaranties and of Principal and Surety*, 3rd edn, at p. 1, is defined as follows:

> A guarantee is a collateral engagement to answer for the debt default or miscarriage of another person.

[27] For a guarantee to be valid, it depends upon the existence of a promise made to a person to whom a debtor is already answerable or is to become answerable (*Harburg India Rubber Comb Company v. Martin* [1902] 1 KB 778 at 784).

[28] We now turn our attention to the interpretation of the several clauses in the shareholders' agreement dated 5 May 2006. We will adopt the meaning that best serves the commercial purpose of the shareholders' agreement. We will apply the business common sense approach which generally favours a commercially sensible construction. In *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] AC 749, at 771, Lord Steyn remarked that:

> In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.

[29] The same approach was adopted by Lord Esher MR in *Weardale Coal And Iron Co, Limited v. C W Hodson, A E Hodson* [1894] 1 QB 598, CA. There his Lordship said (p. 601):

> We must give to the language used the ordinary sense that business men would give to it. The ordinary view of a business man would be that the payment of interest on money borrowed is to be made in respect of that money so long as it is unpaid, and no longer. In this view the covenant to pay interest on a sum of money which is repayable by instalments would be to pay interest on the amount remaining unpaid at any given time. The strict grammatical construction may be that for which Mr. Jelf contends; but the business meaning is that which I have stated, and that is the meaning that must be given to the covenant.

[30] The court in *Law Land Co Ltd v. Consumers Association* [1980] 2 EGLR 109, considered the commercial purpose of the contract clause rather than the words of the clause itself and in the words of Brightman LJ:

> Some modification has to be made to the strict wording of the rent review clause if it is to work. I fully recognise the attractiveness of the arguments advanced by counsel, but they lead to a solution which, to my mind, is not practical and cannot possibly have been contemplated by the parties. The lease is a commercial document and we have to find a commercial solution to the problem posed.

[31] At this juncture, we need to highlight two very salient authorities regarding the business common sense approach in the interpretation of contracts. The first would be the case of *Prenn v. Simmonds* [1971] 3 All ER 237, HL, where Lord Wilberforce said (at pp. 239-240):

> The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. There is no need to appeal here to any modern, anti-literal, tendencies, for Lord Blackburn's well-known judgment in *River Wear Comrs v. Adamson* [1877] 2 App Cas 743, [1874-80] All ER Rep 1, 47 LJQB 193, 37 LT 543, 42 JP 244, 3 Asp MLC, 17 Digest (Repl) 147, 485 provides ample warrant for a liberal approach. We must, as he said, enquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view. Moreover, at any rate since 1859 (*Macdonald v. Longbottom* [1860] I E & E 977, [1843-60] All ER Rep 1050, 29 LJQB 256, 2 LT 606, 120 ER 1181, 17 Digest Repl) 332, 1378) it has been clear enough that evidence of mutually known facts may be admitted to identify the meaning of a descriptive term.

[32] Continuing, and further down at p. 240, Lord Wilberforce had this to say:

> I may refer to one other case to dispel the idea that English law is left behind in some island of literal interpretation. In *Utica City National Bank v. Gunn* [1918] 118 NE 607 the New York Court of Appeals followed precisely the English line. Cardozo J in his judgment refers to 'the genesis and aim of the transaction' citing Stephen's Digest of the Law of Evidence, and Wigmore on Evidence. Surrounding circumstances may, he says 'stamp upon a contract a popular or looser meaning' than the strict legal

meaning, certainly when to follow the latter would make the transaction futile. 'It is easier to give a new shade of meaning to a word than to give no meaning to a whole transaction.' The whole judgment, as one may expect, combines classicism with intelligent realism.

[33] The second authority would be the case of *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] 1 AC 191, HL. There Lord Diplock explained the objective approach to interpretation in the following words (p. 201):

While deprecating the extension of the use of the expression 'purposive construction' from the interpretation of statutes to the interpretation of private contracts, I agree with the passage I have cited from the arbitrators' award and I take this opportunity of re-stating that if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business commonsense.

[34] This court in *Kwan Chew Holdings Sdn Bhd v. Kwong Yik Bank Bhd* [2007] 2 CLJ 127, CA, applied *Prenn v. Simmonds (supra)* and *Antaios Compania Naviera S.A. v. Salen Rederierna A.B. (supra)* and Gopal Sri Ram JCA writing for this court remarked that (see p. 139 of the report):

(17) When a court is asked to determine the true nature of the bargain between contracting parties it is required to take an objective approach. It must have regard to the factual matrix forming the background to the contract to determine the objective aim or purpose of the transaction. It is the objective view based on the test of the reasonable man that is the determining factor and not the subjective view of a party to the contract. The authorities on the point are legion.

[35] From all these authorities, the following principles can be discerned. That the task of interpreting a contract requires an objective approach. And the court must determine the objective aim or purpose of the transaction and this is usually done by taking into account the factual matrix that forms the background to the contract. At the end of the day, the correct test to apply is the test of a reasonable man and this is said to be the stamp of an objective approach as opposed to the subjective view of a party to the contract. Of course, emphasis is always placed on the words used in the contract but where the words used lead to a conclusion that defies business logic, then the contract must be construed in such a way as to make it conform to business logic.

[36] We will now proceed to examine the defences raised by the appellants defendants as alluded to earlier.

(a) The Non-execution Of The Seventh Schedule

[37] The appellants defendants contended that the alleged failure to execute a separate profit guarantee in accordance with the form and substance of a purported Seventh Schedule meant that there is no profit guarantee at all. But, it must be borne in mind that it was the appellants defendants who persuaded the respondent plaintiff, a foreign company, to invest in Top Alloy. This important background fact must not be forgotten and it is relevant in the interpretation of the profit guarantee.

[38] The profit guarantee is housed in cl. 4 of the shareholders' agreement dated 5 May 2006. It reads as follows (see pp. 110 to 111 of the appeal record at vol. 2):

4. Profit Guarantee

4.1 In consideration of GAMA agreeing to the terms and conditions herein contained, the 1st party shall provide to GAMA a profit guarantee (in the form and substance as per the Seventh Schedule hereto) to guarantee that TAMSB shall achieve an audited profit after tax of RM9,900,000-00 being the cumulative profit for four (4) years from 1-1-2007 (hereinafter referred to as 'the Date of Commencement of Operation') till 31-12-2010.

4.2 If TAMSB is unable to achieve the audited profit after tax of RM9,900,000-00 on the expiration of the fourth year of the Date of Commencement of Operation, the 1st party shall pay GAMA, in cash or equivalent of the cash value accepted by GAMA representing the shortfall and the profit guarantee of RM9,900,000-00.

4.3 Notwithstanding sub-clause 4.2, both parties agree as follows:

(a) that the sum payable by the 1st Party to GAMA with respect of the shortfall shall be any sum from the minimum of RM1-00 to the maximum sum of RM2,690,000-00 (hereinafter referred to as the 'Shortfall').

(b) in the event that the 1st Party shall fail to pay to GAMA the Shortfall after the expiration of ninety (90) days from the date of determination of the Shortfall, the 1st Party shall pay to GAMA late payment interest at the rate of seven (7%) per centum per annum (hereinafter referred to as the 'Late Payment Interest') on the Shortfall from the due date of payment until the Shortfall shall be fully paid by the 1st Party to GAMA.

4.4 For the purposes of determining the 'Profit Guarantee' of TAMSB pursuant to the preceding sub-clause, the parties shall take into account the dividend to be declared under clause 16 herein.

4.5 For the purposes of this sub-clause, Bon Chong Hing @ Chong Hing shall not at anytime be released from this 'Profit Guarantee' even though he has ceased to be a shareholder of TAMSB until this Agreement is hereby terminated by the parties.

[39] Relying on cl. 4.1 of the shareholders' agreement, the appellants defendants argued that since the Seventh Schedule was not executed there was no profit guarantee. At this juncture, it is ideal to review the shareholders' agreement dated 5 May 2006 in its entirety. It contains five Schedules, namely, the first, second, third, fourth and fifth. There is no Sixth Schedule or Seventh Schedule at all. To put it in another way. Clause 4.1 of the shareholders' agreement makes reference to something which is non-existent. It states that the appellants defendants are to provide the respondent plaintiff a profit guarantee in the form and substance of the Seventh Schedule but, sad to say, there is no Seventh Schedule incorporated in the shareholders' agreement setting out the form and substance of the profit guarantee.

[40] Taking advantage of the absence of the Seventh Schedule, the appellants defendants argument runs along this simple proposition. That there is an intention not to finalise the profit guarantee. Is this true?

[41] We would answer this question in the negative. In our judgment, cl. 4 of the shareholders' agreement provides clear and precise details of the profit guarantee. It states in unambiguous terms the scope of the guarantee and the circumstances in which it may be called upon. Applying the objective approach, the only pertinent objective conclusion to arrive at is by applying the reasonable man's test. It is this. That cl. 4 of the shareholders'

A agreement is by itself a profit guarantee and that the reference to the Seventh Schedule is merely superfluous. It is not needed. In our judgment, this is the only interpretation that leads to a commercially sensible result.

B **[42]** The appellants defendants interpretation of cl. 4 of the shareholders' agreement goes against the grain of the business common sense approach and it is unacceptable.

[43] The appellants defendants argue that the profit guarantee never took effect. It is an easy way out argument that cannot be C accepted. The respondent plaintiff is a foreign company and it is asked to invest in Top Alloy. The respondent plaintiff then negotiates the terms of the profit guarantee in detail. And the clause wherein the profit guarantee is encapsulated, makes reference to a form wherein the guarantee is to take shape. But, D unfortunately, this form is not found in the shareholders' agreement. It does not make any business common sense to conclude that the foreign company has abandoned the profit guarantee after it had negotiated the details of that profit guarantee and after having those details spelt out in the E shareholders' agreement governing the contractual relationship of the parties.

[44] Now, the explanation that the profit guarantee never took effect may be plausible provided there is in existence the Seventh F Schedule spelling out the form and substance of the profit guarantee. And if there were indeed such a Schedule, then the non-execution of the profit guarantee in that form may possibly be argued that the parties abandoned the need for a profit guarantee. But, the appellants defendants would still need to overcome the G peremptory obligation in cl. 4.1 of the shareholders' agreement which unequivocally provides that the appellants defendants "shall provide" to the respondent plaintiff a profit guarantee (*Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321, CA).

H **[45]** We categorically say that even if there were a Seventh Schedule which the appellants defendants failed to execute, that would by itself amount to a breach of cl. 4.1 of the shareholders' agreement by the appellants defendants. And that breach would entitle the respondent plaintiff to sue the appellants defendants for I breach of contract.

[46] We have anxiously perused through cl. 4 of the shareholders' agreement and we categorically say that it is an operative profit guarantee and is capable of enforcement. The irregular and a typical reference to the non-existent Seventh Schedule in cl. 4.1 of the shareholders' agreement must be made to yield to business common sense. It is always prudent to choose a construction which is most likely to give effect to the commercial purpose of the contract. The fact that the shareholders' agreement makes no reference to the Sixth Schedule lends credence to the irresistible conclusion that the reference to a Seventh Schedule is no more than an anomaly.

[47] At this juncture, it is ideal to refer to the judgment of the Federal Court in the case of *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625, FC. There Gopal Sri Ram JCA speaking for the Federal Court had this to say at pp. 633 to 634:

> The law leans in favour of upholding bargains and not in striking them down willy-nilly. And its declared policy finds expression in the speech of Lord Wright in *Hillas & Co. v. Arcos Ltd.* [1932] All ER (Rep) 494, where he said:
>
> > Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business, may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the Court to construe such documents fairly and broadly, without being, too astute or subtle in finding defects; but, on the contrary, the Court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the Court as (a) matter of machinery where the contractual intention is clear but the contract is silent on some detail.
>
> This principle applies not only to documents drafted by laymen but also to those prepared by lawyers. See, *Australian Broadcasting Commission v. Australasian Performing Right Association Ltd.* [1973] 129 CLR 99.

[48] In her written grounds of judgment, the learned JC applied the correct principles when she concluded at pp. 27 to 28 of the appeal record at part "A":

> 5.1 Merujuk kepada perjanjian bertarikh 5 Mei 2006, ianya hanya mempunyai lima jadual sahaja, tidak ada jadual ketujuh seperti yang disebut di Klausa 4.1 perjanjian itu. Walau bagaimana pun Klausa 4 memperuntukkan dengan jelas mengenai 'profit guarantee' maka mahkamah mendapati bahawa defendan adalah bertanggung untuk membayar kepada plaintif.
>
> 5.2 Mahkamah mendapati bahawa tujuan 'profit guarantee' adalah untuk memberi pampasan (compensate) plaintif sekiranya TAMSB tidak mencapai keuntungan yang disasarkan. Ini bermakna bahawa sekiranya TAMSB menjadi tidak solven dalam tempoh jaminan, kerana tidak mencapai keuntungan minima RM9.9 juta, maka pihak plaintif berhak untuk mendapatkan (call on) gerenti tersebut.

[49] That was certainly a business common sense approach adopted by the learned JC and we see nothing wrong with her approach. We have to ascribe to the words in cl. 4.1 of the shareholders' agreement a meaning that would make good commercial sense. It is a robust approach and it is the best approach in order to give effect to the commercial purpose of cl. 4.1 of the shareholders' agreement.

(b) The Alleged Termination Of The Profit Guarantee

[50] It was argued that the shareholders' agreement was automatically terminated on 15 October 2008 when Top Alloy was put into a creditors' voluntary liquidation. In support of that contention, the appellants defendants relied on cl. 21 of the shareholders' agreement which reads as follows:

> **21. Duration Of Obligations**
>
> 21.1 This Agreement shall automatically terminate in the event that TAMSB enters into liquidation or compounds or makes any voluntary arrangement with its creditors or has a receiver, administrative receiver, administrator or other similar officer or encumbrancer appointed of it or over all or any parts of its asset or suffers any similar action in consequence of debt or becomes unable to pay its debts as and when they fall due.

21.2 On any termination of this Agreement the rights and obligations of the parties hereunder shall cease and determine save in respect of any antecedent breach of this Agreement.

[51] In order to put cl. 21 of the shareholders' agreement in its proper perspective, it is ideal to refer to cls. 1, 2 and 3 of the said agreement which concerns the subscription process and the approvals necessary to complete the process. This is followed by cl. 4 of the shareholders' agreement wherein the profit guarantee is set out. The purpose of the profit guarantee is not in dispute. It is meant to guarantee the respondent plaintiff's return on its investment and at the very minimum guarantee 50% of the capital which the respondent plaintiff had invested. It must be borne in mind that the respondent plaintiff subscribed for 2,690,000 ordinary shares of RM2 each (see cls. 1.1.3 and 1.2.2 of the shareholders' agreement). And it must also be borne in mind that cl. 4.3(a) of the shareholders' agreement states that the maximum profit guarantee that the respondent plaintiff stands to gain is RM2,690,000 which is 50% of the sum which the respondent plaintiff had invested.

[52] This is followed by cl. 5 of the shareholders' agreement and this clause appears somewhat to take on the fashion of a recital to a contract. It states as follows:

5. Shareholders' Agreement

In consideration of the mutual covenants and undertakings herein contained, the parties hereto hereby agree to the terms and conditions contained herein to regulate certain matters concerning their rights and obligations as between each other as shareholders/ members of TAMSB.

[53] And this would be followed by cls. 6 to 20 of the shareholders' agreement which deal with issues ranging from the management of Top Alloy to the appointment of directors as well as issues pertaining to the pre-emption rights and dividends. Then there is cl. 21 of the shareholders' agreement which when read in its proper perspective would show that the rights and obligations contained in cls. 6 to 20 would terminate upon the liquidation of Top Alloy. But the scheme of the shareholders' agreement and the arrangement of the sections therein clearly demonstrate that cl. 21 does not refer to the termination of the profit guarantee in cl. 4 upon the liquidation of Top Alloy.

[54] If what the appellants defendants' contentions were to be accepted, it would result in an illogical situation. It defeats the purpose of the profit guarantee which is essentially to compensate the respondent plaintiff in the event Top Alloy does not achieve a certain amount of profit. Here, Top Alloy had to achieve a profit of RM9.9 million. We say that it is a contradiction in terms to suggest that the profit guarantee terminates and is rendered ineffective upon the insolvent liquidation of Top Alloy.

[55] Applying the business common sense approach it is appropriate to say that if Top Alloy becomes insolvent within the guarantee period, it would mean that Top Alloy did not achieve the minimum profit of RM9.9 million and the respondent plaintiff would be entitled to call on the guarantee. Speaking objectively, the profit guarantee was obviously meant to deal with the eventuality of Top Alloy becoming insolvent. That being the case, it is incongruous with the objective intention of the parties in having a profit guarantee to conclude that it ceases to have effect upon the insolvent liquidation of Top Alloy. Clause 21 of the shareholders' agreement must therefore by necessity be interpreted in a manner that not only gives effect to the objective intention of having a profit guarantee but must also be interpreted in such a manner that makes business sense.

[56] If we were to accept the interpretation that the profit guarantee terminates upon Top Alloy's insolvency, then it is not only inconsistent with business sense but also common sense. To accede to such an interpretation would result in a highly inequitable situation where the appellants defendants would not perform and would allow Top Alloy to go bust in order to secure their release from the guarantee. By way of an illustration, if Top Alloy were trailing the guaranteed profit by RM2 million, the appellants defendants would be tempted to run Top Alloy's business to the ground rather than fork out a sum of RM2 million as compensation. Surely this could not have been the objective intention of the parties.

(c) The First Appellant Defendant Has Been Released From The Profit Guarantee

[57] It is the first appellant defendant's contention that he has been released from the profit guarantee on the ground that the commencement of the creditors' liquidation amounted to a mutual termination of the shareholders' agreement. We beg to disagree

and we say that such a contention is entirely untenable. It seems that the first appellant defendant relies on cl. 4.5 of the shareholders' agreement which reads as follows:

> For the purposes of this sub-clause, Bon Chong Hing @ Chong Hing shall not at anytime be released from this 'Profit Guarantee' even though he has ceased to be a shareholder of TAMSB until this Agreement is hereby terminated by the parties.

[58] Relying on cl. 4.5 of the shareholders' agreement, it is the first appellant defendant's contention that he has been released from the profit guarantee because the said agreement was terminated by the parties. The so called termination which the first appellant defendant is relying upon relates to the decision of both the respondent plaintiff and the appellants defendants' decision to place Top Alloy in creditors' voluntary liquidation. However, viewed from a different vantage point, the first appellant defendant is in fact advancing the proposition that the parties must have continued to operate Top Alloy regardless whether it was insolvent until it is wound up on the petition of a creditor. But since the parties chose to call a creditors' meeting to put Top Alloy in a creditors' liquidation, the first appellant defendant contends that this move amounted to a mutual termination of the profit guarantee.

[59] With respect, this argument is not only preposterous it is also absurd. It is trite law that it is an offence to contract any debt for a company when there is no reasonable or probable expectation that the company would be able to pay the debt. Any person who contracts a debt when he knows that his company is hopelessly insolvent could rightly be classified as a person who contracted a debt without any intention of paying the debt. This may pass off as carrying on the business of the company with the intention of defrauding its creditors. Both these offences are captured in s. 303(3) of the Companies Act 1965 and s. 304(1) of the same Act read together with s. 304(5) of the same Act and are punishable with, *inter alia*, one year imprisonment or fine RM5,000 (under s. 303(3) of the Companies Act 1965) or three years imprisonment or fine RM10,000 (under s. 304(5) of the Companies Act 1965).

[60] We have a situation where Top Alloy was hopelessly insolvent. This is not a disputed fact. If the directors of Top Alloy, which must necessarily include the respondent plaintiff's

A nominated directors, continued to operate the business, it would mean that further debts would be incurred in the form of utilities charges, rentals, staff salaries, overhead charges etc, etc. Given the fact that Top Alloy was hopelessly insolvent and the parties knew of this fact, the directors would be committing an offence carrying B penal sanctions if they were to continue running the business. The only sensible thing to do, in the circumstances, was to halt operations and call a meeting of the creditors and put to the creditors the necessity of winding up the company.

C **[61]** Indeed a voluntary winding up is the best solution to adopt. A voluntary winding up is initiated by the company and it does not depend upon the court to be persuaded to make an order to wind up the company. It is the company who initiates by way of a special resolution to wind up the company. An ordinary D resolution would suffice if the company's constitution provides for the company to be wound up upon the expiry of a certain period or upon the occurrence of a specified event, and that expiry or event has occurred.

E **[62]** Section 254 of the Companies Act 1965 sets out the circumstances in which a company may be wound up voluntarily. It goes without saying that when a company is being wound up severe adverse effects on various parties may take place. And by virtue of s. 219(1) of the Companies Act 1965, a voluntary F winding up is deemed to have commenced at the time of passing of the resolution to wind up.

[63] Now, the decision to place Top Alloy under creditors' liquidation cannot by any stretch of the imagination to be equated as a mutual termination of the profit guarantee. We have perused G through cl. 4.5 of the shareholders' agreement and we categorically say that that clause only deals with a situation where the first appellant defendant is no longer a shareholder of Top Alloy. That clause merely provides that the first appellant defendant will not be released from the profit guarantee even if he H has disposed of or transferred his shares to another person. To secure his release, the first appellant defendant must at the time of the disposal or transfer of his shareholding or soon thereafter secure from the respondent plaintiff a mutual termination of the profit guarantee as against the first appellant defendant.

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[64] We now know that Top Alloy was insolvent and liquidation was the inevitable end of the company. Liquidation or winding up is the process by which a company's assets are realised and distributed and this leads to the ultimate demise of the company. It is the liquidator who is given the duty to wind up the company. It is appropriate to say that when a company is liquidated or wound up, its business is shut down, its assets collected and sold off, its creditors repaid and liabilities discharged, and the net balance (if any still remains) of the liquidated assets will be distributed to its members. The company will then be de-registered and it ceases to exist.

[65] Whether Top Alloy is wound up by way of compulsory liquidation by the court or by a creditors' voluntary liquidation it cannot change the fact that Top Alloy was hopelessly insolvent and its insolvency triggers the profit guarantee. In our judgment, there is no merit in the contention that the first appellant defendant had been released from the profit guarantee when Top Alloy entered into liquidation.

(d) The Ascertainment Of The Shortfall

[66] The appellants defendants contend that the amount payable by them has not been ascertained because the profit guarantee "shall be any sum from the minimum of RM1 to the maximum sum of RM2,690,000". It is a matter of simple mathematics. It must be recalled that the profit guarantee clause provides that Top Alloy must achieve a cumulative profit of RM9.9 million for four years from 1 January 2007 until 31 December 2010. Since it is not disputed that Top Alloy is insolvent, it can be said that its debts and liabilities far exceed its assets. So there is nothing left. Everything is wiped out including the capital of Top Alloy. Put differently, it can be said that the cumulative profit achieved is zero or nought.

[67] It is also ideal to recall to mind that the guarantee provides that if Top Alloy fails to achieve the guaranteed profit of RM9.9 million, the appellants defendants will pay to the respondent plaintiff an amount representing the shortfall subject to a maximum sum of RM2.69 million. Calculation wise, if Top Alloy achieves a profit of RM8 million, then there is a shortfall of RM1.9 million from the guaranteed profit of RM9.9 million. Consequently, the

appellants defendants would have to pay the respondent plaintiff RM1.9 million. And if Top Alloy achieves a profit of only RM5 million, the shortfall is RM4.9 million but the appellants defendants would still have to pay the respondent plaintiff RM2.69 million simply because that is the maximum exposure the appellants defendants have under the guarantee. Factually speaking, Top Alloy has not achieved any profit and the shortfall is RM9.9 million. And the appellants defendants' liability to the respondent plaintiff is in the sum of RM2.69 million.

[68] It is the contention of the appellants defendants that the guarantee sum payable could be anything between RM1 to RM2.69 million. In our judgment, such a contention is devoid of merit. As explained earlier, if the profit achieved is RM9,899,999, then the shortfall is RM1 and that is the extent of the appellants defendants' liability to the respondent plaintiff. It is ideal to emphasise that the appellants defendants' liability increases as the profit achieved diminishes but subject to a maximum exposure of RM2.69 million. Since Top Alloy became insolvent and did not reap any profit, the appellants defendants are liable to the full extent of the guarantee of RM2.69 million. This is the business common sense approach in interpreting the shareholders' agreement.

Conclusion

[69] By way of a recapitulation, we will now summarise the salient features of this judgment:

(a) That the shareholders' agreement dated 5 May 2006 must be interpreted by applying the objective approach and that the language employed must be read so as to give way to a business common sense approach bearing in mind the commercial reality of the matter.

(b) That the profit guarantee is clearly spelt out in cl. 4 of the shareholders' agreement. The reference to the Seventh Schedule must be ignored since there is no such Schedule.

(c) The absence of the Seventh Schedule does not lend support to the contention by the appellants defendants that the parties did not intend to finalise the profit guarantee. In reality, the parties did provide express details pertaining to the profit

guarantee in cl. 4 of the shareholders' agreement and that the language employed in that clause clearly demonstrates that the parties intended it to be an enforceable covenant. To add mileage to this argument, it must be emphasised that cl. 4.1 of the shareholders' agreement places an obligation on the appellants defendants to provide a profit guarantee to the respondent plaintiff. Now, even if there were a Seventh Schedule which the appellants defendants failed to execute, that would only amount to an enforceable breach of contract on their part. That cannot negative the intention that there is a profit guarantee on the terms as stated in cl. 4.1 of the shareholders' agreement.

(d) The intention of the profit guarantee was to protect the respondent plaintiff's investment. As a foreign company, protection must be accorded to the respondent plaintiff. It is against business common sense to argue that the parties took pains to spell out precisely the scope and extent of the guarantee in cl. 4 of the shareholders' agreement but did not intend that it would take effect.

(e) The various clauses in the shareholders' agreement relating to the possible circumstances of its termination and the dire consequences that would follow do not apply to the profit guarantee. It goes without saying that the termination of the shareholders' agreement as a result of Top Alloy's insolvency has no bearing whatsoever on the appellants defendants' liability under the profit guarantee.

(f) The profit guarantee was incorporated into the shareholders' agreement in order to ensure that Top Alloy achieves a minimum profit failing which the respondent plaintiff would be compensated. In the event Top Alloy becomes insolvent, the profit guarantee was obviously intended to cover that possible occurrence.

(g) The parties passed the necessary resolutions and took the necessary steps to place Top Alloy in a creditors' liquidation but this cannot be interpreted to mean that the respondent plaintiff had relinquished its rights under the guarantee. Now, placing Top Alloy in a creditors' liquidation when it was hopelessly insolvent was nothing more than a legal necessity lest the directors' run foul of several provisions of the Companies Act 1965 carrying heavy penal consequences.

A (h) The liability of the appellants defendants under the profit guarantee was intended to survive the insolvent liquidation of Top Alloy. To argue otherwise would render the profit guarantee clause redundant and, at the same time, demolish the aim and purpose of the profit guarantee.

B

[70] For the varied reasons alluded to in this judgment, we unanimously dismissed the appeal with costs of RM3,000. We affirmed the decision of the learned JC. The deposit should rightly go to the respondent plaintiff.

C

[71] We must place on record, our gratitude to learned counsel on both sides for their thought provoking submissions that greatly assisted us in arriving at a just decision. Mr. Tee Yee Koon represented the appellants defendants while Dr. Clarence Edwin with Mr. R. Paramanandan represented the respondent plaintiff.

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